DBHDS
Virginia Department of Behavioral Health and Developmental Services

June 26, 2014

Frequently Asked Questions

Concerning 2014 Changes to Virginia's Civil Commitment Laws

Topics

Medical Screening/Medical Clearance

- ***Is there an effort to standardize the medical screening of patients coming from acute medical facilities and emergency departments?***
  Given the mix of medical and psychiatric morbidities individuals may be experiencing, medical screening should encompass the tests and evaluations necessary to ensure that the particular individual being served is medically stable and can be safely transferred and that the receiving facility is capable of meeting the individual's needs. Thus, it is not possible to standardize the medical screening that will be needed for each person (although DBHDS is aware that some regions use a standard battery to expedite matters). However, on April 1, 2014, DBHDS issued the second edition of the *Medical Screening and Medical Assessment Guidance Materials*, which was developed by public and private practitioners in Virginia to create a framework for consistent practice in this area. DBHDS will make all state facilities aware of the need to communicate clearly and engage ERs to work out problems and encourages private psychiatric units to do so as well. In addition, because each state facility varies in terms of physician presence, types of physicians present (if present 24/7), capacity to manage IVs and other medical/nursing procedures and care, and the time it takes to access 911 or an emergency room, DBHDS has created a checklist to document what service capacities exist in each of the state facilities.

- ***What rights to refusal of medical treatment do patients have with respect to medical screening?***
  The new laws have made no changes related to questions of consent. A person is presumed, under the law, to have capacity to make such decisions. If they lack such capacity, as assessed by a licensed practitioner, then the Code provides for substitute consent via others, beginning with family members. See Virginia Code § 54.1-2981 et seq.

- ***What happens if medical clearance isn't completed within the eight hour timeframe (for instance, the individual has overdosed on Tylenol and levels need to be checked, the individual has a high blood alcohol level, or the individual is too sedated)?***
  The state hospital physician and the ER physician must discuss. If the state hospital physician believes the individual's needs exceed the capabilities of the state hospital, then that should be communicated to the ER physician. If the ER physician decides to send anyway, then the individual must come to the state hospital and the state hospital will need to plan what it will do. This may include immediate transport to the nearest ER or attempting to secure medical admission elsewhere. The best scenario for the individual in a situation where the state facility is not able to meet the individual's medical needs would likely be for the ER physician to keep and treat the individual until he is stable enough to be transferred to the TDO facility, though this will require collaboration with law enforcement. Local stakeholders, including law enforcement, should discuss this scenario to ensure that plans are in place to best meet the needs of individuals. Regional protocols may also want to address this type of scenario.

- ***I have had a dilemma in obtaining a state bed due to the state facility requiring certain labs for medical clearance that the ER doctor did not want to order. Should we automatically ask for labs and chest x-rays that state facilities have been requiring or will state facilities no longer have required labs and x-rays?***
  Given the significant limitations state facilities have in providing safe and appropriate care for acute medical conditions, laboratory and other tests are going to continue to be requested in most cases. Because an individual, early in the process, may be going to a private psychiatric unit or a state hospital, it may be more efficient to proceed to get tests done early to expedite the process, but there is no requirement to do so. Physician to physician contact is needed when there are questions or disagreements regarding what is required for medical clearance. The new state law provisions require the state hospital to accept a patient for temporary detention if an alternative facility cannot be located; therefore, an ER can release an individual to go to the state hospital on a TDO if it chooses. Even though the new law requires a state facility to accept an individual for temporary detention if an alternative facility cannot be found, the requirements of EMTALA, if applicable to the sending facility, must still be met by the sending facility. Transferring an individual to a facility that has stated it cannot safely manage the individual's medical condition is taking a risk on the part of the sending hospital, which could be liable under EMTALA for an inappropriate transfer. Thus, obtaining any tests needed to demonstrate that the individual's condition can be managed in the state facility may be wise. Please note also that on April 1, 2014, DBHDS issued the second edition of the *Medical Screening and Medical Assessment Guidance Materials*, which was developed by public and private practitioners in Virginia to create a framework for consistent medical screening and medical assessment in practice.

- ***What happens if the eight hour ECO period is coming to an end and the state hospital believes the person is not medically clear but the ER has medically cleared the person?***
  The new state law provisions require the state hospital to accept a patient for temporary detention if an alternative facility cannot be located by the expiration of the eight hour ECO period. If the state hospital physician believes the individual's needs exceed the capabilities of the state hospital, then that should be communicated to the ER physician. If the ER physician decides to send anyway, then the individual must come to the state hospital and the state hospital will need to plan what it will do. This may include immediate transport to the nearest ER or attempting to secure medical admission elsewhere. Even though the new law requires a state facility to accept an individual for temporary detention if an alternative facility cannot be found, the requirements of EMTALA, if applicable to the sending facility, must still be met by the sending facility.

Transferring an individual to a facility that has stated it cannot safely manage the individual's medical condition is taking a risk on the part of the sending hospital, which could be liable under EMTALA for an inappropriate transfer. The best scenario for the individual in a situation where the state facility is not able to meet the individual's medical needs would likely be for the ER physician to keep and treat the individual until he is stable enough to be transferred to the TDO facility, though this will require collaboration with law enforcement. Local stakeholders, including law enforcement, should discuss this scenario to ensure that plans are in place to best meet the needs of individuals. Regional protocols may also want to address this type of scenario.

- ***What is recommended for a situation where an ECO reached the 8-hour mark and the individual being assessed meets TDO criteria and has been "medically cleared" but has medical needs beyond what the state facility can handle - like dialysis, feeding tubes, etc.***
  The new state law provisions require the state hospital to accept a patient for temporary detention if an alternative facility cannot be located by the expiration of the eight hour ECO period. If the state hospital physician believes the individual's needs exceed the capabilities of the state hospital, then that should be communicated to the ER physician. If the ER physician decides to send anyway, then the individual must come to the state hospital and the state hospital will need to plan what it will do. This may include immediate transport to the nearest ER or attempting to secure medical admission elsewhere. Even though the new law requires a state facility to accept an individual for temporary detention if an alternative facility cannot be found, the requirements of EMTALA, if applicable to the sending facility, must still be met by the sending facility. Transferring an individual to a facility that has stated it cannot safely manage the individual's medical condition is taking a risk on the part of the sending hospital, which could be liable under EMTALA for an inappropriate transfer. Local stakeholders should discuss this scenario to ensure that plans are in place to best meet the needs of individuals. Regional protocols may also want to address this type of scenario.

- ***The eight hour period of the ECO is expiring and the physician at the state facility and the physician at the ER are still in disagreement regarding medical clearance. What should the CSB do?***
  The CSB should obtain a TDO to the state facility. The new state law provisions require the state hospital to accept a patient for temporary detention if an alternative facility cannot be located; therefore, an ER can release an individual to go to the state hospital on a TDO if it chooses. Even though the new law requires a state facility to accept an individual for temporary detention if an alternative facility cannot be found, the requirements of EMTALA, if applicable to the sending facility, must still be met by the sending facility. Transferring an individual to a facility that has stated it cannot safely manage the individual's medical condition is taking a risk on the part of the sending hospital, which could be liable under EMTALA for an inappropriate transfer. The best scenario for the individual in a situation where the state facility is unsure if it can meet an individual's medical needs or is not able to meet the individual's medical needs would likely be for the ER physician to keep and treat the individual until he is stable enough to be transferred to the TDO facility, though this will require collaboration with law enforcement. Local stakeholders, including law enforcement, should discuss this scenario to ensure that plans are in place to best meet the needs of individuals. Regional protocols may also want to address this type of scenario.

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Change of Facility of Temporary Detention

- ***Can the change of facility under a TDO occur at any time - up until the hearing time?***
  Yes. Under the new law (HB1172), the CSB may change the facility of temporary detention and designate an alternative facility for temporary detention at any point during the period of temporary detention if it is determined that the alternative facility is a more appropriate facility for temporary detention of the individual given the specific security, medical, or behavioral health needs of the person.

- ***If an individual is admitted to a crisis stabilization unit (CSU) under a TDO and the CSU becomes unable to manage or care for the individual, is a state facility obligated to accept a transfer?***
  Under the new law (HB1172), the CSB may change the facility of temporary detention and designate an alternative facility for temporary detention at any point during the period of temporary detention if it is determined that the alternative facility is a more appropriate facility for temporary detention of the individual given the specific security, medical, or behavioral health needs of the person. The new law does not require a state facility, or any other facility, to accept for admission an individual in this circumstance. If the initial facility of temporary detention becomes unable to meet the needs of an individual, the CSB should be notified. Upon receiving such notification, the CSB should conduct a search for an alternative facility in accordance with the regional protocol. If such a search does not result in the location of a bed, the appropriate state facility should be contacted for admission.

- ***Will law enforcement have to transport if an individual under a TDO is transferred from a state facility to a private facility?***
  Under the new law (HB1172), if a CSB changes the facility of temporary detention at any time during the temporary detention period, the CSB shall request from a magistrate an order specifying an alternative transportation provider or, if no alternative transportation provider is available, willing, and able to provide transportation in a safe manner, the local law enforcement agency for the jurisdiction in which the person resides or, if the nearest boundary of the jurisdiction in which the person resides is more than 50 miles from the nearest boundary of the jurisdiction in which the person is located, the law enforcement agency of the jurisdiction in which the person is located, to provide transportation.

- ***If the CSB changes the facility of temporary detention, who will notify the petitioner?***
  The new law (HB1172) only requires the CSB to notify the clerk of court of a change in the facility of temporary detention. Specifically, the new law requires the CSB to notify the clerk of the name and address of the alternative facility on a form provided by the Executive Secretary of the Supreme Court. Although the law does not require the notification of the petitioner at the time a change in facility is made, Virginia Code § 37.2-814(F) requires that the petitioner be given adequate notice of the place, date, and time of the commitment hearing. This notice should still be provided in the manner that it is currently being provided regardless of whether a change in facility has occurred.

- ***If the CSB changes the facility of temporary detention, must transportation to the new facility be done within a certain time frame?***
  In cases where the individual is still in the process of being transported and the CSB changes the facility of temporary detention to an alternative facility, the individual should be transported directly to the alternative facility. In cases where the individual has already been transferred to the initial facility of temporary detention and the CSB changes the facility, the CSB shall request the magistrate to enter an order specifying an alternative transportation provider, or if an

alternative transportation provider is not available, law enforcement to provide transportation. The law does not specify a certain period of time within which the transportation must occur.

- ***If the CSB changes the facility of temporary detention, does the time within which a hearing must be held change?***
  No. The period of temporary detention begins to run when the TDO is executed. A change of facility during the temporary detention period will not re-start the period. The new laws lengthened the TDO period from 48 to 72 hours. Thus, after July 1, 2014, a commitment hearing must be held within 72 hours of execution of the TDO regardless of whether the facility of temporary detention is changed during that 72 hour period. If the 72 hour period ends on a Saturday, Sunday, or day on which the court is closed, the hearing must be held by close of business on the next day that the court is open.

- ***Can the facility of temporary detention be a training center?***
  No. Judicial certification of eligibility for admission to a training center is governed by Virginia Code § 37.2-806.

- ***Does the new law permitting the CSB to change the facility of temporary detention require the CSB to determine that the alternative facility is better for the person?***
  Under the new law (HB1172), a CSB may change the facility of temporary detention at any point during the period of temporary detention if it determines that the alternative facility is a more appropriate facility for temporary detention of the individual given the specific security, medical, or behavioral health needs of the person. In making the determination of whether an alternative facility is more appropriate for the temporary detention of an individual, the CSB should consider whether a facility is the least restrictive to meet an individual's needs.

- ***Does the new law permitting the CSB to change the facility of temporary detention require an alternative facility to accept an individual?***
  No. An alternative facility determined to be more appropriate for temporary detention of an individual must be willing to admit the individual in order for the CSB to designate it as an alternative facility.

- ***If law enforcement is transporting an individual that had been medically cleared by an ER and the CSB changes the facility of temporary detention, will the ER be notified?***
  The new law (HB1172) only requires the CSB to notify the clerk of court if it changes the facility of temporary detention. However, nothing would prohibit the CSB from notifying the ER of a change in the facility of temporary detention if requested. In addition, good practice dictates the admitting temporary detention facility to contact the ER if there are any questions regarding the individual's needs or prior treatment.

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ECO Timeframe

1. ***If a person is not under an ECO but after evaluation is determined to meet the criteria for a TDO, is a state facility required to take the individual after eight hours?***
   No. The new law requires state facilities to admit patients only if an alternative bed cannot be found at the end of the eight hour emergency custody period under an ECO. In cases where a

patient is not under an ECO and has agreed to an evaluation that has resulted in a determination that the patient meets the TDO criteria, the CSB is not limited to a certain period of time within which to conduct a bed search. Thus, it is expected that a thorough bed search will be conducted according to protocol. If the CSB is having difficulty locating a bed, the appropriate state facility should be notified. Ultimately, if the CSB is unable to locate a bed after conducting a thorough bed search, the appropriate state facility should be called and the state facility will accept the individual for admission. If during the time the CSB is conducting the bed search the patient is no longer voluntarily willing to remain, the CSB should pursue an ECO or, if the magistrate is unwilling to issue an ECO, a TDO to a state facility.

- ***Who is responsible for maintaining custody if the eight hour ECO period expires, an alternative facility for temporary detention has not been located, and the state facility defers admission due to the individual's medical issues?***
  If an individual is subject to an ECO and meets the criteria for temporary detention, and an alternative facility for temporary detention has not been found by the end of the eight hour ECO period, a state facility will be designated on the TDO. A state facility cannot defer such an individual's admission for medical reasons under the new state law. Sending facilities must still meet the requirements of EMTALA, if applicable.

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Private Hospitals

- ***When presenting a potential TDO client to a private facility, we often get told that the private facility has beds but not an appropriate bed. What responsibility do private hospitals have to take TDO admissions?***
  Private hospitals make independent decisions about their immediate capacity and the types of individuals they are able and willing to serve. Nothing in the new laws changes that. Private hospitals, if subject to EMTALA, should ensure that they meet their obligation under EMTALA to accept a transfer if they get a request and they have specialized capabilities and the capacity to treat the individual.

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State Bed Capacity

- ***How will the Department ensure that enough beds will be available at the state facilities?***
  Although it is impossible to quantify exactly how many beds will be needed, the Department plans to not only maximize state facility capacity, but to also maximize options available in the community. Ensuring sufficient capacity will require collaboration amongst all community and state partners at both the "front door" and the "back door" to ensure that beds are available when they are needed.

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Online Psychiatric Bed Registry

- ***In terms of the bed registry, what does "real-time" mean?***

Under the new law (SB260), the acute psychiatry bed registry shall provide real-time information about the number of beds available at each facility or unit including the type of patient that may be admitted, the level of security provided, and any other information that may be necessary to allow identification of appropriate facilities for temporary detention. Although there is not a legal definition of "real-time," it should be given its plain meaning. Thus, the bed registry should be updated whenever there is a change in the availability of beds. The Department acknowledges that this can be extremely difficult when there are multiple discharges and admissions but expects providers that are required to participate in the bed registry to do so in accordance with the law. The bed registry requirements of the new law were effective upon passage and thus, are currently in effect.

- ***Is use of the bed registry mandatory?***
  The new laws require every state facility, CSB, behavioral health authority, and private inpatient provider licensed by the Department to participate in the bed registry by submitting real-time information about available beds. Although the law does not mandate CSB evaluators to search the bed registry when trying to locate a bed for an individual, it should be a helpful tool in conducting a bed search.

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Protected Health Information

- ***Is a CSB pre-screener allowed to re-release protected health information given to the CSB by the ER? For example, can printed hospital records be sent to facilities for consideration of admission?***
  Yes. Both the HIPAA Privacy Rule and Virginia's Health Records Privacy Act allow health care providers to disclose protected health information for treatment purposes. *See* 45 C.F.R. § 164.506; Virginia Code § 32.1-127.1:03(D)(7). Locating a facility of temporary detention meets the definition of treatment under the HIPAA Privacy Rule. *See* 45 C.F.R. § 164.501. If the protected health information to be disclosed is covered by the regulations governing substance abuse information found at 42 C.F.R. Part 2, a provider shall only disclose in accordance with those regulations.

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Geriatric Population

- ***When seeking a TDO admission for an adult older than 65 years old, should the CSB contact the regional state facility (i.e. Western State) or should the CSB directly contact the geriatric state facility (Catawba)?***
  The new law requires the CSB to contact the state facility for the area in which the CSB is located. If the individual is over 65 years of age, the CSB should contact the state facility that serves geriatric patients for the area in which it is located. Similarly, if the individual is a minor, the CSB should contact the state facility that serves minors for the area in which it is located.

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Prescreening

- ***How will the preadmission screening form be changed to reflect the new laws?***
  The new laws do not impact the preadmission screening form so no changes will be necessary.

- ***Will the new laws change the qualifications necessary to be a CSB prescreener?***
  The new laws do not change the qualifications that an employee or designee of a CSB must meet in order to conduct preadmission screening evaluations. However, HB1216/SB261 require the Department to review requirements related to qualifications, training, and oversight of individuals performing preadmission screenings and to make recommendations for increasing such qualifications, training, and oversight. The Department must report its findings and recommendations to the Governor and the General Assembly by December 1, 2014.

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TDO Execution

- ***If a TDO has been issued and the individual has left, can law enforcement look for the individual and still serve the TDO?***
  Yes. However, under the new law, an individual under an ECO who has been determined to meet the criteria for temporary detention should not be released. If an individual does leave the site where the emergency evaluation occurred, law enforcement has 24 hours from issuance of the TDO to search for the individual and execute the TDO before it is void.

- **Can a TDO be served and executed by fax?**
  Yes. Virginia Code § 37.2-804.1 states that petitions and orders for emergency custody and temporary detention may be filed, issued, served, or executed by electronic means, with or without the use of two-way electronic video and audio communication, and returned in the same manner with the same force, effect, and authority as an original document. CSBs, magistrates, and law enforcement should discuss the filing, issuance, and execution of ECOs and TDOs by electronic means to develop an efficient process that best meets the needs of individuals.

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Written Summary of ECO and TDO Procedures

- ***Written summaries of the ECO and TDO procedures are required to be given to anyone who is subject to an Emergency Custody Order or Temporary Detention Order. Where are these forms?***
  New forms summarizing the Emergency Custody and Temporary Detention procedures have been developed for this purpose by the Office of the Executive Secretary of the Supreme Court of Virginia. The forms will be available July 1, 2014 at:
  www.courts.state.va.us/forms/district/civil.html.

- ***Is a written summary of TDO procedures required to be given to an individual who was not the subject of an ECO prior to the issuance of a TDO?***
  Yes. Under the new law, a person in custody under a TDO shall be given a written summary of the temporary detention procedures and the statutory protections associated with those procedures regardless of whether the person had been subject to an ECO prior to the issuance of the TDO.

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